

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Saugata Bhattacharyya

A.P.O. 171 of 2018

With

A.P. 455 of 2014

The Jute Corporation of India Ltd.

Vs.

ABL International Ltd. (now Sudera Realty Pvt. Ltd.)

And

A.P.O No. 172 of 2018

with

A.P. No.456 of 2014

Jute Corporation of India Limited

Vs.

Vineet Private Limited

A.P.O. No.180 of 2018

With

A.P. No.616 of 2014

Sudera Realty Private Limited

Vs.

The Jute Corporation of India Ltd.

And

A.P.O No. 181 of 2018

With

A.P. No.618 of 2014

Sudera Realty Private Limited

Vs.

The Jute Corporation of India Ltd.

For the Appellants in

APO 171/2018 and APO 172 of 2018

And Respondents in APO 180 of 2018

And APO 181 of 2018

: Mr. Tilak Bose, Sr. Adv.

: Mr. Anuj Singh, Adv.

: Mr. Debabrata Das, Adv.,

: Mr. Partha Banerjee, Adv.,

: Mr. Saptarshi Mukherjee, Adv.

For the appellants in

: Mr. Jishnu Saha, Sr. Adv.,

APO 180 of 2018 and APO 181 : Mr. U.S. Menon, Adv.,
of 2018 and respondents in : Mr. Zeeshan Haque, Adv.,
APO 171 of 2018 and 172 of 2018 : Mr. Abhirup Chakraborty, Adv.
: Mr. Ishaan Saha, Adv.

Hearing concluded on : 27th April, 2023

Judgment Date : 10th May, 2023

Soumen Sen, J.:- These present appeals and cross-appeals are arising out of a common judgment and order dated April 23, 2018 passed by a learned Single Judge in connection with four applications for setting aside of two arbitral awards both dated December 20, 2013 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter ‘the 1996 Act’).

I. Summary of Facts

2. The facts relevant for the purpose of deciding these appeals, are summarised below:-

I. Sudera Enterprises Pvt. Ltd. executed a deed of lease in favour of the award-debtor, i.e. Jute Corporation India Ltd. (hereinafter ‘the Corporation’), on December 5, 1972 in respect of 5th floor of premises no.1, Shakespeare Sarani, Kolkata - 700 071 (hereinafter referred to as ‘the said premises’). Subsequently the parties have entered into another lease agreement regarding the 7th floor of the said premises on January 1, 1976. The successors-in-interest of Sudera Enterprises Pvt. Ltd. in respect of the 5th and 7th floor of the said premises are Vineet Pvt. Ltd. and ABL International Pvt. Ltd respectively. They shall be described as ‘lessors’ of both floors of the said premises to avoid confusion.

- II. Both the lease agreements were for a period of 21 years, with an option for renewal for a term of ten years on certain terms and conditions being fulfilled. The lease for the 5th floor and the 7th floor of the said premises expired due to efflux of time on September 1, 1994 and January 1, 1997 respectively. The Corporation, however, did not vacate the two floors upon the expiry of the leases.
- III. On April 21, 1995, the lessor of the 5th floor filed a suit in this Court, being Suit No. 138 of 1995, against the Corporation praying inter alia for *khas* possession of the 5th floor of the said premises and mesne profits. The Corporation filed a counter-suit being Suit No. 134 of 1996 for a decree for specific performance of the agreement in respect of the 5th floor of the said premises and renewal of the lease by a further period of ten years. The suit filed by the lessor was allowed and a decree for eviction and mesne profits was passed on March 12, 1998, and the suit filed by the Corporation was dismissed.
- IV. In the meantime, the lessor of the 7th floor also filed another suit in this Court, being Suit No. 93B of 1997, against the Corporation in respect of the 7th Floor with similar reliefs. In the said suit, the lessor filed an application for summary judgment under Chapter XIII A of the Original Side Rules of this Court. By a judgment and decree dated July 14, 1998, a Learned Single Judge of this Hon'ble Court allowed the said application and directed the Corporation to hand-over vacant possession of the 7th floor of the said premises to the lessor on or before March 1, 1999. The learned Single Judge also

appointed a Special Referee to assess mesne profits for the period of overstay by the Corporation.

- V. Aggrieved by the orders passed in both the proceedings, the parties filed three separate appeals. The first two appeals were filed by the lessors and the Corporation respectively against the order of the Single Judge dated March 12, 1998 in respect of the 5th floor of the said premises. The third appeal was filed by the Corporation against the order of the Single Judge dated July 14, 1998 allowing the Chapter XIII A application of the landlord in respect of the 7th floor of the said premises.
- VI. A Division Bench of this Court was pleased to dispose of the first two appeals by an order dated August 24, 1999. In regards the third appeal, a Division Bench of this Court, by an interim order dated April 19, 1999, after recording the undertaking of the Corporation to pay occupational charges at the rate of Rs.60/- per sq. ft. per month inclusive of air conditioning and service charges, granted a stay on the operation of the judgement and decree of the Single Judge dated July 14, 1998. Ultimately, the said third appeal was dismissed by the Division Bench by a judgment and order dated August 11, 1999. The Division Bench however, granted stay of operation of the said order on the prayer of the Corporation on an undertaking to pay a sum of Rs.50 lakh to the lessor.

- VII. Thereafter, the parties filed separate Special Leave Petitions in the Hon'ble Supreme Court, against the orders passed by the Division Bench dated August 11, 1999 and August 24, 1999 respectively. The Special Leave Petitions filed by the lessor against the order dated August 24, 1999 were registered as S.L.P. Nos. 13567-13568 of 1999, whereas the Special Leave Petitions filed by the Corporation were registered as S.L.P. Nos. 14726-14727 of 1999. In regards the order dated August 11, 1999, the Special Leave Petition was filed by the Corporation was registered as S.L.P. (C) No. 13827 of 1999.
- VIII. On September 24, 1999, the Hon'ble Supreme Court, in respect of the appeals against the order dated August 24, 1999, directed the counsel for the parties to seek instructions for proper determination of the rent so as to bring quietus to the litigation in respect of the 5th floor of the said premises. On October 1, 1999, the Supreme Court, in respect of the appeal against the order dated August 11, 1999 directed the Corporation to pay as per the undertaking given by it before the Division Bench on April 19, 1999, as a precondition for considering the question of admitting the Special Leave Petition.
- IX. Thereafter, several discussions took place between the parties and two lease deeds were executed between the parties with respect to the 5th and 7th floor of the said premises respectively on January 24, 2000. In these new lease deeds, it was agreed that the period of lease would be for ten years commencing from September 1, 1994 for the

5th floor of the said premises, while the lease in respect of the 7th floor of the said premises would end on January 1, 2007.

X. In both lease deeds, it was agreed that the consolidated rent would be @ Rs.27.35 per sq. ft. per month only. This consolidated rent would include Rs.3.33 per sq. ft. per month as basic rent, Rs.4.95 per sq.ft. per month as the service charge, and Rs.19.07 per sq. ft. per month as air conditioning charge, cleared of all deductions, effective from December 1, 1999. The Corporation also agreed to pay arrears of rent up to November, 1999 @ Rs.23.33 per sq.ft. per month. These new lease deeds with respect to both floors of the said premises were placed before the Hon'ble Supreme Court. The Hon'ble Supreme Court disposed of all the Special Leave Petitions on February 14, 2000, whilst recording in its order that the parties had arrived at a settlement and that the parties shall approach the High Court at Calcutta to withdraw all suits and proceedings pending in the Hon'ble Court in accordance with the settlement arrived at between the parties.

XI. The lessors called upon the Corporation on April 28, 2000 and May 23, 2000 respectively to get the new lease deeds both dated January 24, 1999 in respect of the 5th and 7th floor of the said premises registered but the Corporation failed to do so. On August 31, 2000, the Corporation gave notice surrendering the lease of the 5th and 7th floor of the said premises, which was objected to by the lessors. The

Corporation ultimately vacated both floors of the said premises on and from October 31, 2000. Thus leading to dispute.

XII. In accordance with the two lease deeds dated January 24, 2000, the parties initiated arbitration proceedings for resolving their disputes. An application was filed in the Hon'ble Court, being A.P. No. 53 of 2001, under Section 11(6) of the 1996 Act for the appointment of an arbitrator. This Hon'ble Court, by an order dated September 26, 2002, appointed the Hon'ble Mr. Justice (Retd.) S.N. Bhattacharya, a former Judge of this Court, as the sole arbitrator with regard to the dispute between the parties in relation to the new lease deeds. Due to the demise of Mr. Justice Bhattacharya, by an order dated September 11, 2008, the Hon'ble Mr. Justice (Retd.) Suhas C. Sen, a former Judge of the Supreme Court, was appointed as the new arbitrator.

XIII. Mr. Justice Suhas C. Sen passed the impugned awards both dated December 20, 2013. In the first award in respect of the 5th floor of the said premises in A.P. No. 53 of 2013, Mr. Justice Sen held that the new lease deed was in the nature of a "package deal", whereby the occupation of the 5th floor of the said premises by the Corporation was regularized retrospectively at the agreed rate of rent. It was held that the Corporation had clearly violated the agreement between the parties since the lease deed did not have a termination clause by which the Corporation could have terminated the lease. The Corporation could not take advantage of the non-registration of

the lease deed on its part and was therefore liable to pay damages for the breach of the new lease deed.

XIV. On the question of the quantum of damages, the consolidated rent agreed upon by the parties was considered and it was held that the air conditioning charges were not an integral part of the lease rent. The liability of the respondent was only to pay the basic rent @ Rs.3.33 per sq.ft. per month as damages. The learned arbitrator on the basis of such finding passed an award of Rs.35 lakh as damages in favour of the lessors whilst stipulating that if the said amount was not paid within a period of three months from the date of the award, the Corporation would be liable to pay interest at the rate of 10 per cent per annum from the date of the award till the date of final payment.

XV. In the award in respect of the 7th floor of the said premises in A.P. No. 52 of 2001, the learned arbitrator gave an award of Rs.50 lakh in favour of the lessors on the same reasoning and same conditions as mentioned in the award in relation to the 5th floor of the said premises.

II. Proceedings before the Learned Single Judge

3. Being aggrieved by the two awards, the lessors filed two applications under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside of the awards being A.P. No. 616 and A.P. No. 618 of 2014.

The Corporation also filed two applications for setting aside being A.P. No. 455 and A.P. No. 456 of 2014.

4. Briefly summary of the substance of the case made out by the parties before Justice I.P. Mukherjee is indicated below:

(i) *The lessor's Case before the Learned Single Judge:*

5. The primary grievance of lessors was that the learned arbitrator in the two awards had held that the landlord was only entitled to damages @ Rs.3.33 per sq. ft. per month for the residual period of the leases from the Corporation disregarding the consolidated rent agreed between the parties @ Rs.27.35/- per Sq Ft. per month.

6. The consolidated rent would include air conditioning and service charges. The learned arbitrator had ignored his own finding of fact that the lease agreement was in the nature of a "package deal" between the parties. There was no finding that the service charge was not part of the lease rent. The learned arbitrator had ignored the fact that the payment of air conditioning charges would be irrespective of functioning of AC.

7. The lease agreement provided for increase in air conditioning charges due to increase in rate of charges per unit of electricity consumption. It did not provide for the converse scenario of decrease in charges due to decrease in electricity costs. The lessors, *inter alia*, have prayed for setting aside of the impugned awards and grant of damages @ Rs.27.35 per sq. ft. per month from the Corporation instead of Rs.3.33/- per sq. ft. along with interest.

(ii) *The Corporation's Case before the Single Judge:*

8. The primary grievance of the Corporation was that the learned arbitrator did not consider the fact that the lessors were unable to show that it had taken steps to mitigate its loss. The duty to mitigate fell on the lessors and the burden of proof to show that it had exercised its duty to mitigate was on the lessors. The application claimed that, initially, the documents and oral evidence disclosed by the lessors before the arbitrator did not disclose any steps being taken to mitigate. However, later, there was an attempt to disclose documentary evidence for showing that sincere attempts have been made to mitigate the damage. In the application it was alleged that the objections of the Corporation to the filing of the new evidence were not taken into account and were not mentioned in the impugned awards.

9. The two awards were challenged on the ground of patent illegality and violation of public policy.

(iii) *The Judgment of the Learned Single Judge*

10. On consideration of the pleadings, materials on record and the arguments of the parties, Justice I.P. Mukerji passed the impugned judgment and order dated April 23, 2018. The learned Single Judge found that the lease deeds of the said premises were grossly under-stamped and unregistered.

11. The argument that the said lease deeds merely extended the already existing tenancy was rejected. It was held that the extension of a

lease occurs when there is an underlying demise, and such an extension does not require registration or payment of stamp duty, since there is no fresh demise of the property or any fresh creation of interest therein. In contrast, when a lease comes to an end another lease is created by a fresh demise, which requires payment of stamp duty and registration if it is for more than one year under Section 107 of the Transfer of Property Act, 1882 read with Section 17 of the Registration Act, 1908 and the Indian Stamp Act, 1899. In reaching this conclusion, the learned Single Judge had placed reliance on the following authorities:

1. ***Banker v Merckel***, reported in **1960 (1) All E.R. 668**,
2. ***State of U.P. & Ors. v. Lalji Tandon (Dead) Through L.R.s.***, reported in **2004 (1) SCC 1**,
3. ***Provash Chandra Dalui v. Biswanath Banerjee***, reported in **1989 Supp (1) SCC 487**,
4. ***State of Gujrat & Ors. v. Nirmalaben S. Mehta & Anr.***, reported in **2016 (9) SCC 240**,
5. ***Sociedade De Fomento Industrial (P) Ltd. v. Hede & Company***, reported in **2007 (5) SCC 614**.

12. Applying this interpretation of the law to the facts, the learned Single Judge agreed with the findings of the learned arbitrator that in the present case there was no extension of an already existing lease but the creation of a new lease altogether. The learned Single Judge held that under Section 49 of the Registration Act, the lease deeds could not be received in evidence, since they were not registered, It was also held that no right in the

property in question was transferred. However, Justice Mukerji has stated that the Court could look into the lease deeds for collateral purposes, as held in ***K.B. Saha & Sons Private Ltd. v. Development Consultant Ltd.***, reported in **2008 (8) SCC 564**. Placing reliance on ***SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd.***, reported in **2011 (14) SCC 66**, it was held that the subject of the lease deeds could not be looked into for any purposes under Section 35 of the Indian Stamp Act and in such circumstances, the lease was to be treated as one that was from month to month being terminable by 15 days' notice as held in ***Food Corpn. of India & Ors. v. Babulal Agarwal***, reported in **2004 (2) SCC 712** and ***Rabindra Nath Pal v. Dr. Subodh Chandra Halder***, reported in **(2006) 110 C.W.N. 227**.

13. It was also held that handing over vacant possession of the premises could not have caused any damage, meaning thereby that the lessee was not liable to recompense the lessor for any alleged loss. Hence, it was held that the lease deeds could not be looked into by the learned arbitrator to ascertain the terms and conditions thereto. However, the learned Single Judge noted that the arbitrator's view that there was an equitable lease over and in respect of the said premises is a view supported by authorities like ***Suleman Haji Ahmed Umar v. P.N. Patel***, reported in **AIR 1933 Bom 381** and Section 53A of the Transfer of the Property Act. Keeping this in mind and placing reliance on ***Associate Builders v. D.D.A.***, reported in **2015 (3) SCC 49**, the learned Single Judge held that the view of the arbitrator was one of two equally tenable views, and since a court in a

setting aside application was not hearing an appeal, the learned Single Judge was inclined not to interfere with the learned arbitrator's award in this regard.

14. The learned Single Judge declined to accept the argument that the lessee could not have relinquished the said premises within the time fixed by the demise. The argument that the stipulation as to rent was to be taken as the minimum amount payable by the lessee on quitting the said premises prior to the expiry of the leases was also rejected. In distinguishing the cases cited, the learned Single Judge stated that in the instant case there was at best an equitable lease, rather than a legal lease, in favour of a lessee with the stipulation that the lessee could not leave the premises before the expiry of a particular period of time, without paying liquidated damages. In any case, His Lordship has stated that he could not find any concrete term in the lease deeds specifying an amount payable in case of breach.

15. The learned Single Judge in considering the issue whether the award of damages by the learned arbitrator was in accordance with law answered this question by referring Section 73 of the Indian Contract Act, 1872. It was held that, for the purposes of estimating loss or damage under the said section, one has to take into consideration the circumstances that existed for the party suffering the breach to reduce his loss and damage. Justice Mukherjee was of the view that the plaintiff could not claim the damages as quantified by them for he has a duty to reasonably reduce the damages as far as possible so that the damages awarded to him is

reasonable. In this regard, Justice Mukherjee has relied upon the observations of Viscount Haldane in ***British Westinghouse Electric & Manufacturing v Underground Electric Railways Co. of London Ltd.***, reported in [1912] A.C. 673 at page 689. This principle had been approved in ***Murlidhar Chiranjilal v Marishchandra Dwarkadas & Ors.***, reported in AIR 1962 SC 366 and restated in ***The Soholt***, reported in [1983] 1 Lloyd's Rep. 608. It was held that whether a loss was avoidable by a reasonable action on the part of the plaintiff is a question of fact not of law, as held in ***Payzu Ltd. v. Saunders***, reported in [1919] 2 K.B. 581.

16. Furthermore, the learned Single Judge quoted a judgment of the Division Bench of the Madhya Pradesh High Court in ***Pannalal Jugatmal v. State of M.P.***, reported in AIR 1963 MP 242 and made reference to the case of ***Mt. Aliya Begam & Ors. v. Mt. Mohini Bibi & Ors.***, reported in AIR 1943 Oudh 17, to state that Section 73 of the Indian Contracts Act casts a burden upon the claimant to show that he did not possess the means of remedying the inconvenience caused by the non performance of the contract and the burden is placed on the claimant to show that being that the innocent party should make a reasonable exertions to render the injury as light as possible.

17. On such consideration it was held that the lease rent could not be taken as the only factor in calculating damages. It was the duty of the Landlord to show how they could have mitigated their damages by indication of another lessee for the whole of the unexpired period of the lease or part of it. Thus, the learned Single Judge held that on this point on

the mitigation of damages, the impugned award was against the substantive law of India and was plainly unreasonable, irrational based on no evidence.

18. The learned Single Judge set aside the impugned award in so far as it dealt with the question of damages and appointed Hon'ble Mr. Justice Dipak Saha Roy, a retired Judge of this Court, as the arbitrator to decide the claim for damages and remitted the award for further consideration on this issue only. His Lordship stated that before the learned arbitrator would embark on deciding the question of damages another opportunity would be given to the parties to disclose the evidence examine witnesses, produce documents and make arguments on the question of damages only.

III. Submissions of the Parties in Appeal

iv. Submissions on behalf of the Corporation

19. Mr. Bose submits that the success and failure of the appeal would depend upon a decision on issue nos. 6 and 7. The said issues are:

“6. Whether the claimant is entitled to any compensation for the illegal breach of contract?

7. If so, to what extent?”

20. Mr. Tilak Bose, learned Senior Counsel for the Corporation, has argued that under Section 73 of the Indian Contract Act, 1872 damages have to be reasonable and foreseeable, i.e. not remote. In estimating such

loss and damage, the means which existed for remedying the inconvenience caused by the non-performance of the contract must be taken into account, as provided in the Explanation to Section 73. Mr. Bose submits that the onus is clearly on the claimant to prove such damages and the learned Single Judge has come to a finding that this onus has not been discharged by the claimant, lessors.

21. The finding of learned Single Judge based on an interpretation of Section 73 of the Contract Act as placed by Mr. Bose is as follows:-

“The plaintiff cannot claim the entire damages that has occurred during the breach of the defendant. He has a duty to reduce the damages as far as possible so that the sum to him is reasonable.”

“The learned Arbitrator has not considered the question of mitigation of damages at all. In one line he has dealt with the issue accepting the evidence of the claimant that they could not get a lessee or tenant for those two floors.....”

“If the respondent had determined the contract abruptly then the lease rent should not be taken as the only factor in calculating damages”

“It was the duty of the claimant to show how they could have mitigated these damages by induction of another lessee or tenant for the whole of the unexpired period of the lease or part of it.”

22. Mr. Bose submits that there was no evidence in support for the claim on account of damage. There is simply no whisper in the award of ABL International Ltd. However, the learned Arbitrator has noted that "the facts

and points of law in this case are similar to the dispute raised in the case of Vineet Pvt. Ltd....."

and "in view of the reasons given in the case of Vineet Pvt. Ltd. in A.P. No.63 of 2991, the case is disposed of by a similar award."

23. For Vineet Pvt. Ltd. now Sudera Realty Pvt. Ltd. as noted by learned Single Judge in the impugned order and judgment "in one line he has dealt with the issue, accepting the evidence of the claimant that they could not get a lessee or tenant for those two floors....."

24. The finding in the award in relation to 5th floor (Vinet Pvt. Ltd.) by Learned Arbitrator is as follows:-

"However, the claimant has adduced evidence to show that the disputed premises could not be let out during the unexpired lease period. The respondent has not produced any evidence to the contrary."

25. Mr. Bose submits that:

- i) the entire finding is based on no evidence.
- ii) Learned Arbitrator did not even choose to discuss any part of the evidence or documents which were attempted to be used on behalf of the claimant in Vineet Pvt. Ltd.
- iii) Mr. Bose submits that in the 3rd sitting held on 30.04.2009, learned Sr. Counsel appearing on behalf of Jute Corporation of India Ltd. moved a formal application before Arbitral Tribunal for recalling the order of 25.11.2008 by which fresh evidence was allowed when directions were given to such application. Arguments in this regard were made at the 5th sitting held on 5.8.2009. At the 6th sitting held on 6.8.2009, an order was passed by learned Arbitrator that the evidence of Panmal Sethia would be subject to objection as to admissibility. There is no

discussion regarding admissibility of the evidence of Panmal Sethia by learned Arbitrator in the award. In the absence or failure on the part of the claimant to prove its claim, the award should be set aside on that ground alone. Mr. Bose submits that there is an error apparent on the face of the award. The Learned Arbitrator has equated the claim of the landlord to the proof of the claim inasmuch as apart from few statements made by Panmal Sethia there was practically no evidence on the basis of which the Learned Arbitrator could have passed an award towards damages as held in ***State of Rajasthan & Ors. v. Ferro Concrete Construction Pvt. Ltd.***, reported in **2009 (12) SCC 1**, [paragraphs 52-55]. It is further submitted that the expression “whether or not actual damage or loss is proved to have been caused thereby” mentioned in Section 74 of the Indian Contract Act, has been interpreted in ***Kailash Nath Associates v. D.D.A. & Anr.***, reported in **2015 (4) SCC 136** to mean that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract as a genuine pre-estimate of damage or loss can be awarded. Mr. Bose submits that this principle has been clearly stated in paragraphs 29-30, 33, 43 of the said report.

- iv) Mr. Bose has argued that any finding on the breach and the claim for damages is required to be supported with reasons and in absence of any reason in view of Section 31(3) of the Arbitration and Conciliation Act, 1996, the entire award is liable to be set aside. In fact there are no reasons except a bald one line statement and such statements are regarded in law as findings without reasons.

1. ***State of West Bengal -vs- Bharat Vanijya*** reported in **2020 (1) WBLR Cal 199**.

- v) Division Bench Judgment of the Madras High Court in ***Hindusthan Petroleum v Banu Construction*** decided on 9th February, 2021.

26. The Tribunal could not have decided the claim for damages merely on the basis of the statements of Panmal Sethia. In fact, one Mr. Gautam Roy on behalf of the claimants adduced evidence. However, damage and mesne profits were attempted to be proved by one Atanu Mitra who filed on affidavit of evidence. After the erstwhile arbitrator died and Justice S.C. Sen (Retd.) was appointed an attempt was made to file fresh evidence which was opposed as before the previous learned Arbitrator arguments were closed. However, fresh affidavit evidence was filed by Panmal Sethia on behalf of the claimants and the learned arbitrator had allowed such evidence to be taken on record after permitting withdrawal of earlier affidavit evidence by Atanu Mitra.

27. Mr. Bose submits that an unregistered document can only be used as an evidence for collateral purpose and it must be independent of the transaction which by law requires registration, meaning thereby, that such transaction would not create any right, title or interest in the property. However, in view of non-registration the said lease agreement is inadmissible in evidence and none of its terms can be admitted in evidence. The reliance on tenure clauses by the lessors to show that it is for a definite period of 10 and 7 years respectively cannot be looked into as it is an important clause which cannot be used for any collateral purpose as would be evident from the decision of Hon'ble Supreme Court in ***Park Street***

Properties Private Limited v. Dipak Kumar Singh & Anr., reported in **2016 (9) SCC 268**.

28. Even if it is assumed for the sake of agreement that the terms of the lease deed can be looked into, it will be evident, according to Mr. Bose, that there is no specific lock-in period. Even learned Single Judge in impugned order and judgment dated 23rd April, 2013 has rejected the argument based on lock-in-period by holding that lease did not provide for the same in the following words:

“In my opinion argument concerning lock-in-period in the lease has no manner of application in this case.....”.

29. Fundamentally, in the commercial world, all contracts are determinable in nature provided reasonable notice is given, even in the absence of a specific clause enabling either party to terminate. Mr. Bose submits that a contract can never be perpetual, and even if the contract may not contain an express termination clause, Section 106 of the Transfer of Property Act provides a mode of termination by allowing both the lessor and the lessee the right to terminate by giving 15 days' notice.

30. Moreover, whoever wants to take benefit of registration of a lease must have it registered. Usually, it is the tenant who wants protection against eviction and therefore, get it registered. Section 32 of the Registration Act casts duty on both lessor and lessee to register as observed in ***Rabindra Nath Pal v. Subodh Chandra Halder*** reported at **110 CWN 227**.

31. Mr. Bose submits that the learned arbitrator has proceeded that “the agreement between the parties was in the nature of a “package deal” and observed:

“The occupancy of the 7th floor by the respondent was regularized retrospectively at an agreed rate of rent Rs.27.35 per square feet per month. Having regard to the facts and circumstances discussed above, I am of the view that the lease deed dated 24th January, 2000 was part of a packaged deal by which disputes and differences between the parties were settled and on the basis of which Supreme Court disposed of the cases pending before it.” The above findings of the learned Arbitrator have been sustained by the Hon’ble Single Judge on the ground that the said view is “plausible view”.

32. Mr. Bose submits that the impugned awards are de hors the contract, since whether or not the contract was a ‘package deal’ in light of the prior proceedings before the Supreme Court was wholly immaterial, and the arbitrator overstepped his jurisdiction by considering the terms of the agreement “a package deal”, when such terms are clear and unambiguous. Hence, the finding of the arbitrator that the contract was a package deal was patently illegal and against the fundamental law of India.

33. Assuming it was indeed a package deal and documents in connection with the agreement including its terms (whether collateral or otherwise) can be looked into, the award is perverse and also unreasoned since it fails to take into account such terms. Section 28(3) of the Arbitration and Conciliation Act, 1996 enjoins a duty of the Arbitrator to pass an award

in terms of the contract prior to amendment in 2015. Thus it was duty of learned Arbitrator to look into all terms of the contract which the learned Arbitrator has regarded as “a package deal”.

34. It is submitted that the documents which were forwarded by Advocate on Record of Sudera Realty Pvt. Ltd. under cover of a letter dated 26th September, 2003 during the course of the arbitration proceedings were completely ignored. If the award of learned Arbitrator was indeed on the basis of a package deal then the terms of the “package deal” ought to have been identified and considered. If such terms of the package deal are looked into then the entire claim of Sudera Realty Pvt. Ltd. Would be without any basis.

35. Mr. Bose referred to the following documents and relevant clauses in such documents said to have been disclosed in the letter dated 26th September, 2003, they are:

- i) Proposed Memorandum of Understanding 19th November, 1999.

It states the following:

"Clause 3(a) states that no A.C. charges to be paid when A.C. service is not provided due to whatever reasons."

This is also reflected in the agreement dated 24th January, 2000 and Clause 3(c) of the said agreement provides for inclusion of a TERMINATION clause.

- ii) A suggested order which was signed on behalf of Sudera Realty Pvt. Ltd. On 3rd January, 2000 in clause 2 states that Jute

Corporation of India could vacate the occupied portion on 31st August, 2004 for 5th floor and 31st December, 20006 (for 7th floor) or earlier by giving three months' notice to Sudera.

36. Mr. Bose argues that the unregistered agreement dated January 24, 2000 being a lease deed containing the arbitration clause was compulsory registrable in view of Section 17 and Section 49 of the Registration Act, 1908 read with Section 35 of the Indian Stamp Act, 1899.

37. Mr. Bose asserts that the agreements were compulsorily registrable and the Corporation was fully justified in exercising its statutory rights under Section 106 of the Transfer of Property Act. Mr. Bose submits that there can be no estoppels against a statute and the reliance placed by Mr. Saha on ***Babulal Agarwal*** (*infra*) is wholly misconceived since the judgment is concerned with moveable property. The said judgement is related to a lease of hiring of plinths for storage of food grains (movable property) and did not relate to lease of any immovable property. The said judgement has to be read in its true perspective and in fact supports the case of Jute Corporation of India. The said Judgement relied upon by the claimant has rightly been distinguished by the Hon'ble Single Judge.

38. Mr. Bose submits that the entire set of documents annexed to the affidavit of Panmal Sethia are either fraudulent documents or wholly irrelevant. Eight documents annexed to the affidavit of evidence of Mr. Sethia. The said documents with the comments of Mr. Bose are given in a tabular form below:

Document	Comment
i. Letter dated 16 th October, 2003.	This letter is to be compared with the with the letter of the same date both purportedly signed by Atanu Mitra. It forms part of an affidavit evidence of Atanu which was later withdrawn and amongst others it contains a landline number that is, 22827615 which would clearly show that the said document is forged.
ii. Letter dated 2 nd June, 2004 disclosed in the affidavit filed by Panmal Sethia.	The said letter is signed apparently by Mr. Rampuria, Director. The phone number is clearly mentioned as 22827616. The said phone number of ABL International is incorrect as would be apparent from pp.240,241, 242 and 243 of P.B.Vol.II which are all annexed to the affidavit of Atanu Mitra which were not taken on record.
iii. Letter dated 13.9.2004.	A letter in response to an advertisement and is also near the end of tenure of lease of 5th floor (Vineet), that is, 31.12.2004.
iv. Letter dated 8.6.2004.	The said letter too contains an incorrect phone number 22827616 whereas the correct phone number 22827615 as would appear from the affidavit evidence of Atanu Mitra.
v) Letter dated 2.6.2004.	It was alleged to have been signed by Director but has incorrect phone number 22827616 whereas the correct number would be 22827615 as would appear from affidavit evidence of

	Atanu Mitra.
vi. Letter dated 15.12.2004.	It was in respect of 1,40,000 sq. ft. area at a point of time when tenure of lease for Vineet had nearly expired, namely 5th floor on 13 th December, 2004. It would also appear from such document that seven floors were being offered.
vii. Letter dated 24.1.2005.	It was written by Director, Mr. Rampuria by which date the tenure of the lease for Vineet (5th floor) had already expired. It would also appear from the purported letter that three floors have been mentioned.

On the basis of the aforesaid unreliable documents it is now sought to be contended and argued that there were some evidence before learned Arbitrator to support such one line unreasoned finding of the learned Arbitrator.

39) Mr. Bose submits that damages are always assessed on the date of the breach. There is simply no document on the record to show the steps taken by the claimant to assess damages or to mitigate loss on the date of the breach, that is, the date of notice dated 31st August, 2000. Those notices are not under challenge and has taken into account by the learned Single Judge in the impugned judgment.

40) Mr. Bose submits that the “one line” finding with regard to evidence by learned Arbitrator is perverse.

41) The finding of learned Arbitrator regarding evidence of mitigation is not supported with any reason.

42) Finding of learned Arbitrator on the basis of above fraudulent and/or irrelevant documents will be regarded as a finding based on no evidence.

43) What is more significant is that all the purported documents annexed to the evidence of Panmal Sethia are in the letter head of ABL International Ltd. and finding of learned Arbitrator in the detailed award is based on 5th floor belonging to Vineet Pvt. Ltd. There is not a single document in the letter head of Vineet (5th floor).

44) Mr. Bose has drawn our attention to the observation of the learned Single Judge, that the claimant cannot claim damages for entire unexpired period occurred due to alleged breach of the respondent. The Claimant had a duty to “reasonably reduces the damages as far as possible so that the sum awarded to him were reasonable” and it was the duty of the claimants to show how they could have mitigated these damages by induction of another lessee tenant for the whole of unexpired period of lease or part of it.”

45) Mr. Bose submits that it is a basic requirement in a claim for damages that the claimant has to prove damages which are reasonable and it is a duty of the court to assess and award damages in accordance with the principle laid down in Section 73 of the Contract Act. The award of the learned Arbitrator is unreasoned on the question of assessment or reasonable damages envisaged under Section 73 of the Contract Act. Since

assessment of damages was a specific issue before the learned Tribunal the award ought to have been passed on proper appreciation and understanding of Section 73 of the Contract Act which states that damages must be reasonable. The learned Single Judge has correctly observed that there is inadequacy of evidence in support of damages.

46) Mr. Bose submits that the claimants want the court exercising jurisdiction under Section 34 of the Act to interfere with the construction of the contract clause given by learned Arbitrator in arriving at damages. The learned Arbitrator has relied on the terms of the contract, namely, the lease deed and in particular clause IV(i) in quantifying damages @ Rs.3.33 per sq. ft. being the basic rent and denying any amount towards air condition. The said clause reads:

“It is hereby confirmed, recorded and declared that in view of the order passed by the Hon’ble Division Bench and the Supreme Court of India, the consolidated rent hereby agreed is fair and reasonable rent and it is arrived at by the parties hereto the rent prevailing in the vicinity at present for similar premises and the parties hereto shall not be entitled to challenge or dispute the same before any Forum in any manner whatsoever or howsoever.”

47) Mr. Bose submits that the claimants now want to contend that the finding of the learned Arbitrator upon construction of the document that air condition charges were not integral part of the lease rent cannot be interfered with in this jurisdiction.

48) Our attention is drawn to clause 12 of the said agreement which records:

“The said arrears have been calculated after deducting the sum already paid by the lessee to the lessor pursuant to various Courts’ order and for the period during which air-conditioning was not provided by the lessor to the lessee.”

49) It is thus submitted that the agreement itself records that for the period air-conditioning was not provided deduction would be made.

50) Mr. Bose in this regard has relied upon letter dated 22nd October, 1999 in which Jute Corporation has stated that “while calculating the arrear rent proportionate deduction in air conditioning charges would be made for the period during which A.C facility was not provided at 5th and 7th floors premises.....” and letter dated 26th November, 1999 Jute Corporation of India had forwarded a cheque for Rs.50 lacs towards arrears and also finalized the MoU.

51) Our attention is also drawn to Clause 3(a) of the proposed MoU which states as follows:

“But no AC charges to be paid when AC service is not provided due to whatever reason.”

52) The agreement which was finally executed on 24th January, 2000 clearly mentions that for the arrear rent, the air-conditioning charges were discounted for the period when A.C. was not provided by the lessor to the lessee.

53) There can be therefore no doubt that for the unexpired period of the lease, air-conditioning charges could not be regarded as part of rent. This is the interpretation given by learned Arbitrator and such construction of documents and contract cannot be interfered with in an application under

Section 34 of the Arbitration & Conciliation Act, 1996. In fact, in the impugned order and judgment dated 23rd April, 2018, this portion of the award has not been interfered with in view of ***Associated Engineering Builders vs. Delhi Development Authority*** reported in **2015(3) SCC 49 (para 41.3 and 42.3)**.

54) Mr. Bose submits that the circumstances under which an award can be challenged, has been lucidly explained in ***Associated Engineering Builders v. Delhi Development Authority*** reported in **2015(3) SCC 49** (paragraphs 41.3 and 42.3) and the ground of challenge on the construction of the said agreement falls within the jurisdiction of the arbitrator and is not amenable to scrutiny in this jurisdiction.

55) Mr. Bose submits that the learned Single Judge in deciding the application for setting aside has given liberty to the claimant/landlord to demonstrate that they were entitled to damages @ Rs.60/- per sq.ft. per month when the quantum of damages had already been fixed for the unexpired period by the learned Arbitrator on the basis of the construction of the documents on record.

56) Mr. Bose has referred to page 432 of the paper book Vol.I and drawn our attention to the following observation of the learned Single Judge:

“The factor for calculating damages would be the reasonable letting out value of the premises for the whole of this unexpired period.”

57) Mr. Mitra has submitted that reasonable letting out value has no manner of application and was not even claimed before the Arbitral Tribunal.

58) Mr. Bose has submitted that the claimants before the learned arbitrator has claimed damages @ Rs.27.35 per sq. ft. and the inflated figure of Rs.60 towards damages although originally claimed was given up and in this proceeding also they restricted their claim to the consolidated rent as the basis for the quantification of the damages.

59) Mr. Bose submits that learned Single judge failed to appreciate that it was not a case where Jute Corporation of India was in wrongful occupation of the premises, as a result whereof, Sudera Realty Pvt. Ltd. was unable to utilize the premises. Reasonable letting out value could not have been a factor. The damages which could be claimed was not on the basis of reasonable letting out value but the damages which Sudera Realty Pvt. Ltd. alleged to have suffered because Jute Corporation of India did not stay for the entire duration and as a result whereof did not pay the fixed rent for this period.

60) Mr. Bose submits that the judgment of the learned Single Judge in remanding the matter for fresh adjudication on damages is contrary to law and liable to be set aside.

61) Mr. Bose submits that the learned Single Judge in the impugned judgment has clearly erred in remanding the matter (if that was at all possible) of the assessment of damages, instead of restricting such a remand to the question of mitigation. The learned Senior Counsel submits that Jute Corporation is not agreeable to a fresh reference and that it is trite law that the remand of a matter to an arbitrator after disposal of an

application under Section 34 for fresh consideration is not permissible under the law.

Submissions on behalf of the Landlord

62) Per contra, Mr. Jishnu Saha, learned Senior Counsel for the landlord, submits that the arbitrator's finding that the lease deeds herein were in the nature of the package deal that allowed the Corporation to continue to occupy the said premises at a consolidated rent @ Rs.27.35 per sq. ft. per month, subject to the Corporation continuing to remain in possession for a further period of ten years since the lapse of the earlier leases cannot be called into question. Mr. Saha asserts that it is not the Corporation's case that no reasonable person could have taken the view that has been taken by the learned arbitrator in the impugned awards, meaning thereby that such finding cannot be disturbed.

63) The lease dated 24th January, 2000 is the settlement on the basis whereof the Hon'ble Supreme Court dismissed the Special Leave Petition filed before it (Order dated 14th February, 2000) with liberty to the parties to approach the High Court to withdraw all pending proceedings.

64) The lease records in significant details, the circumstances in which the same came to be executed. A summary of such detail is provided hereunder:

- i) The suit being Suit No. 93B of 1997 was filed by the respondent for eviction of the appellant from the 7th floor of Premises No. 1, Shakespeare Sarani, Kolkata on the expiration of a lease dated

1st January, 1976 by efflux of time. An application under Chapter XIII A of the Original Side Rules was filed in the said suit which was decreed on 14th July, 1998 directing the eviction of the appellant from the said 7th floor of the premises. The said decree also appointed a Special Officer to determine the mesne profits payable by the appellant for having continued in occupation of the said premises after expiration of the lease.

- ii) An appeal was preferred by the appellant against the said order. Upon an appeal being preferred against the decree and Court was pleased to pass an order on 19th April, 1999, recording the undertaking of the appellant to pay @ Rs. 60/- per sq. ft. per month for its occupation of the 7th floor premises. The decree and order dated 19th April, 1998 was stayed on the basis of such undertaking.
- iii) During the pendency of the appeal, the Special Officer submitted his report determining the mesne profits of the said 7th Floor premises at Rs. 75/- per sq. ft. per month.
- iv) The appeal filed by the appellant against the decree and order dated 14th July, 1998 was thereafter dismissed on 11th August, 1999.
- v) Against the judgment and order dated 11th August, 1999, the Jute Corporation of India, the appellant herein filed a Special Leave Petition. The Hon'ble Supreme Court passed an order in the said Special Leave Petition recording that no payment had

been made by the appellant in spite of the direction of the High Court which proceeded on the undertaking of the appellant to pay @ Rs.60/- per sq. ft. per month. The order further recorded that the parties will seek instruction with regard to the proper determination of the rent to give a quietus to the litigation. The Hon'ble Supreme Court thereafter passed a further order on 1 October, 1999 recording the undertaking given by the appellant to the Division Bench of the High Court at Calcutta to pay rent @ Rs.60/- per sq. ft. per month and observing that only in the event of the appellant showing its bonafide by obeying such undertaking, the Court would be inclined to consider the question of special leave. By the said order the appellant was directed to furnish proof of deposit as per the undertaking dated 19th April, 1999 within a period of two weeks.

vi) Following the same, the appellant for the first time offered to settle the matter with the respondent. This will be evident from the following letters exchanged between the appellant and the respondent:

- a. The letter of the Corporation on 5th October, 1999.
- b. Appellant's letter dated 11th October, 1999.
- c. The letter of the claimant (Sudera) dated 15th October, 1999.
- d. Letter dated 22nd October, 1999.
- e. Letter dated 26th November, 1999 enclosing a draft MOU.

- f. Letter dated 3rd January, 2000 enclosing a suggested order for settling the dispute.
 - g. Sudera letter dated 19th January, 2000 enclosing the respondent's suggested order.
- vii) As will appear from the said letters, the appellant invited the respondent to fix a date for holding discussions to mutually settle the terms and conditions for renewal of the lease and to hold further meetings to work out a mutually arrived settlement in the matter. The respondent called upon the appellant to give its final and firm offer in writing to which the appellant responded by stating that the respondent had expressed its interest in a composite settlement in renewal of the lease of both 5th and 7th floors of the premises. The MOU that was forwarded by the appellant under the cover of its letter dated 26th November, 1999 contained in clause 3(c), a term for inclusion of a termination clause which was objected to by the respondent. The handwritten endorsement on the top left-hand corner of the said document mentioned that the said lease would have to be for at least 10 years. That the now illegible handwriting on the top left hand corner of the said document provided for a lease for at least ten years will be evident from Q. Nos. 80, 81 and 82 asked to the claimant's witness Gautam Roy which was not controverted in cross-examination. The draft suggested order forwarded by the appellant under the cover of its letter dated 3rd January, 2000

also included a condition in clause 2 for determination of the lease by giving three months' notice. This was not accepted by the respondent. In the suggested order forwarded by the respondent under the cover of its letter dated 19th January, 2000 which provided that "JCI undertakes to this Hon'ble Court to vacate the occupied portion on the aforesaid seventh floor on January 1, 2007.....". The said date of 1st January, 2007 was suggested as the same would be the completion of tenth year from the date of expiration of the lease dated 24th January, 2000 which was with effect from 1st January, 1997. This suggested order was accepted by the appellant as would be evident from the endorsement made on the right-hand bottom corner of the letter dated 19th January, 2000 and would also appear from the Q. No. 94 asked to the claimant's witness Gautam Roy which has remained uncontroverted in cross-examination.

viii) It is in these circumstance that the lease was executed on 24th January, 2000 recording, *inter alia*, the following:

1)a) "..... The lessor has hereunto granted to the lessee all that 7th floor containing 17320 sq.ft. be a little more or less to HOLD the same unto the lessee for a further period of ten years with effect from 1st January, 1997 at a monthly consolidated rent of Rs.27.35 (Rupees Twenty-Seven And Paise Thirty-Five) per sq. ft. per month comprising of Rs.3.33 as basic rent and Rs.4.95 as service charges and Rs. 19.07 as air-conditioning charges

clear of all deductions to be effective from December 1, 1999 and the lessee has further agreed to pay the arrear from 1st January, 1997 upto November, 1999 on the basis of a consolidated rent payable @Rs.23.33 per sq.ft. per month.”

b) 7. In case of any default in payment of the air- conditioning charges for any two months by the lessee, the lessor may in its sole discretion, and upon prior written notice to the lessee, discontinue or disconnect and/or withdraw the air-conditioning facilities from the said floor without being liable for damages for such discontinuance and/or disconnection and/or withdrawal, provided, however, and in any event the lessee shall remain liable to pay 50% of the monthly air-conditioning charges agreed to be paid hereunder. The lessor shall not be bound to restore or resume or continue the supply of the air-conditioning facilities unless full payment of the arrears of such charges is made by the lessee together with such amount towards reconnection charges as the lessor in its sole and absolute discretion may determine."

c) "5.....This deed is only Memorandum recording the terms and conditions which have already been agreed between the parties hereto whereby the original lease dated January 1, 1976 for 21 years has been further extended by ten years and no demise has been created by this deed-- --". (emphasis supplied)

d) "Clause 7- As contained in the earlier lease deed dated January 1, 1976, the cost and expenses for execution and

registration of the lease such as stamp duty, registration charges etc. shall be borne by the lessee."

e) "All pending suits and proceedings in the High Court at Calcutta shall stand disposed of and on the terms and conditions agreed upon and recorded herein."

f) It is on the basis of such lease and on the basis of the obligation undertaken by the appellant to register the same that the parties approached the Hon'ble Supreme Court on 14th February, 2000 for recording the settlement whereupon the order of settlement was passed by the Hon'ble Supreme Court taking on record the lease deed dated 24th January, 2000 executed by and between the parties.

65) Mr. Saha submits that the finding of the learned Arbitrator that, it was a package deal, is the end result that can be reasonably inferred from the aforesaid documents and the conduct of the parties.

66) The lease was executed on 24th January, 2000. The Hon'ble Supreme Court recorded the settlement arrived at between the parties in terms of the said lease on 24th January, 2000. Following the same, the respondent proceeded to withdraw the suit filed by the appellant both in respect of the 5th and 7th floors of the premises.

67) The learned Arbitrator taking into consideration cumulative facts and circumstances resulting in the execution of the unregistered lease agreement has arrived at a finding that it is a package deal.

68) Mr. Saha submits that the conduct of the Corporation is of great importance. It is submitted that after the withdrawal of the suit, on 20th March, 2000, the respondent wrote to the appellant calling upon it to register the lease. Instead of proceeding to do so, the appellant responded by serving on the respondent a notice dated 29th March, 2000 purporting to terminate the lease with effect from 30th April, 2000.

69) The claimant vehemently objected to the purported termination of the lease by the appellant by its letter dated 4th April, 2000 in view of the clear agreement between the parties that the appellant would occupy the property for ten years. Following the claimant's response, the Corporation withdrew its notice dated 29th March, 2000 by a letter dated 17th April, 2000.

70) On 23rd May, 2000, the respondent once again called upon the appellant to register the lease. Without taking any step to do so, the appellant served on the respondent a fresh notice dated 31st August, 2000 (*page 151/169*) purporting to terminate the lease with effect from 31st August, 2000.

71) It is thus evident that the appellant wants to wriggle out of its obligation and avoid to pay at least Rs. 60/- per sq. ft. per month for having overstayed at the 7th floor of the premises after the expiration of the earlier lease of 1st January, 1976 on the promise of occupying the leased premises for a further period of ten years from the date of expiration of the earlier lease, ending on 1st January, 2007, without having any intention of actually honouring such promise even despite the fact that the rent was reduced to a

consolidated sum of Rs.27.35 per sq. ft. per month on the assurance of continued occupation of the 7th floor premises for a further period of ten years by the appellant. To wriggle out of the obligation of paying even such reduced rent for the balance period of about seven years, the appellant refused to register the lease despite having clearly agreed to do so. Immediately after the withdrawal of the suits, the appellant instead of registering the lease hurriedly proceeded to terminate the lease. While alleging financial crunch as the cause for such termination in its first notice dated 29th March, 2000, the same was not repeated as a ground in the subsequent notice or in the pleading filed in the arbitration proceedings. Despite it having been clearly agreed to avail of such reduced rent and that the appellant would continue in occupation of the premises at least for ten years after expiration of the earlier lease, which would inter alia, borne out from the exchange of pleadings, correspondence, drafts the appellant never intended to honour such obligation despite having induced even the Hon'ble Supreme Court into believing that the settlement had been reached on the basis of the appellant's agreement to continue in the premises for a further period of ten years since the expiration of the earlier lease.

72) In the circumstances as aforesaid, the respondent was compelled to ultimately accept possession on 31st October, 2000 of the 7th floor premises, albeit without prejudice to its right to claim damages.

73) It is in view of the disputes which had arisen between the parties in view of the premature termination of the lease by the appellant that the reference to arbitration was made.

74) In the statement of claim filed by the respondent the respondent asserted that the appellant had expressly agreed to the extension of the original lease for a further period of ten years till 1st January, 2007. Thus, the respondent claimed damages at two separate rates, i.e., @Rs.60/- per sq. ft. per month in view of the undertaking given by the appellant itself before the Division Bench of the Hon'ble High Court and at the contractual rate of Rs.27.35 per sq. ft. per month as provided in the lease.

75) Mr. Saha submits that in the counter statement the Corporation has raised essentially the following defences, namely, i) the lease deed is unregistered and in the absence of the registration it is void, nonest and could not be given effect to. ii), The tenure mentioned in the lease indicated the maximum period upto which the appellant would occupy. iii), The transaction between the parties was a commercial transaction at arm's length and not a concessional rate of consolidated rate as alleged by the respondent. iv) It was immaterial that the lease dated 24th January, 2000 did not provide for termination.

76) Mr. Saha submits that at its 13th sitting the Arbitral Tribunal framed 8 issues, however, significantly no specific issue was framed with regard to mitigation of damages by reason of the fact that no such issue was raised by the Corporation in its counter statement.

77) Notwithstanding such fact, the respondent proceeded to examine witnesses to prove its attempt to mitigate the loss occasioned by the appellant. Mr. Saha has referred to the order passed by the Tribunal on 6th May, 2009 taking on record the affidavit of evidence of the respondent's

second witness Panmal Sethia. It will be evident from the said order that the same was a common order passed in both references for the 5th and 7th floors. It will be evident from the cause title of the affidavit filed by Panmal Sethia that the same was a common affidavit filed in both references. As will appear from paragraphs 5 to 15 of the said affidavit, Panmal Sethia deposed with regard to various attempts made by the respondent to let out 5th and 7th floors of the premises.

78) Two premises under two Lease Deeds dated 24th January 24 were situated in the 5th and 7th floors of the premises No.1, Shakespeare Sarani, Kolkata. While the demised premises on the 5th floor measured 17320 sq.ft., the demised premises on the 7th floor measured 19035 sq. ft. The aggregate area leased in the two floors was as such 36355 sq. ft. It is to protect the income from such large area that the respondent agreed to lease out the two demised premises to the appellant at a concessional rate of Rs.27.35/- per sq. ft. per month, even though the appellant had agreed and undertaken to pay Rs. 60/- per sq.ft. per month to the Hon'ble Supreme Court, the mesne profits for the said premises had been determined by the Special Referee at Rs.75/- sq.ft. per month. It is common knowledge that it is difficult to find persons and entities who would be willing to take such a large area on rent.

79) Mr. Saha emphasized that the respondent had led evidence before the Arbitrator to the effect that in spite of the attempts made by it to lease/let out the demised premises for the residue periods of the leases it was unable to do so. There is no cross-examination of

the respondent's witness in this regard. Mr. Saha submits that in answer to Question No.110 of examination in chief, the claimant's witness Gautam Ray (CW-1) deposed that the respondent has suffered loss and has disclosed the reasons thereof. Sudera was unable to let out the premises and the premises have remained vacant since 1st November, 2000. This would be further evident from the answer to the Learned Arbitrator's question No.55 to Gautam Ray (CW-1) in examination.

The evidence of Panmal Sethia, CW-2 (the witness of the claimants) on mitigation of damages has been analysed by Mr. Saha in the manner following:

- a. Sudera/ABL engaged the services of property brokers to find tenants for the property. These brokers had responded to public advertisements for lease of large commercial space. (paragraphs 2 and 10 affidavit of evidence).
- b. That through those brokers, negotiations had taken place with several well known companies including banks. However, after initial negotiations in support whereof documents have been annexed to the affidavit, all the interested parties had backed out, (Paragraphs 11 of affidavit of evidence).
- c. That the property market was depressed at the relevant point of time. This was especially so for the suit property since there were new property developments in and around the said premises and large commercial establishments like Brooke

Bond and Lipton had vacated their corporate head quarters adjoining the said premises. As a result, there were no takers for the premises in question.

- d. That the same fate was met by Peerless General Finance & Investment Company Limited the owner of the second, third and fourth floors of the same premises. They had stopped using those three floors previously occupied by them but could not let or sell property. These three were unutilized and vacant from 1995 till 2008 (Paragraphs 17 and 18 of affidavit of evidence)
- e. That the property market improved only after the year 2006 and Sudera/ABL was able to let out the premises in February, 2007 (fifth floor) and November 2007 (seventh floor).
- f. That even during the time when the premises were vacant i.e. from 1st November, 2000 till 2007, Claimants to bear the proportionate cost of operating central air conditioning plant. This was because central air conditioning plant, one of the first of its kind in Kolkata installed in the 1972, cannot be partly shut down. Therefore, even if ducts on the fifth and seventh floors were shut, the air conditioning plant had to operate as it is. Therefore, the air conditioning charges (based actuals) which were payable in terms the agreement with the Respondent that is 19.07/- sq. per month was incurred. Claimants have given that the air conditioning charges which

the other tenants of the premises including National Insurance Company Limited, had to pay during this period i.e. Rs. 26.06/- per sq. ft. per month for the year 2000 upto Rs. 32.76/- per sq. ft. per month for the year 2007.

There is no cross examination on any of three aspects.

80) Various documents relied on by Panmal Sethia to prove that such attempts were in fact made form part of the record in the arbitration proceeding. Mr. Saha has drawn our attention to pages 294, 297, 298, 299, 303, 307,312 and 317 of the paper book which are correspondence exchanged between the claimants and prospective lessors between June 2, 2004 and January 24, 2005.

81) The Learned Arbitrator in the award passed in A.P.O. No. 172 of 2018 has recorded his satisfaction as regards the respondent having led sufficient evidence to demonstrate the attempts made by it to mitigate its losses on account of the breach committed by the appellant.

82) Panmal Sethia's evidence was recorded as common evidence in both proceedings. His cross-examination was as such also common in both references relating to the 5th and 7th floors. It will appear therefrom that there was no suggestion made to Panmal Sethia regarding there being no effort made by the respondent to let out the premises or that the same could have been let out but was not so done.

83) In the award passed in A.P. No. 53 of 2001, the learned Arbitrator, inter alia, recorded that in the discussion held between the parties, the Corporation had "committed themselves to retain the said two

floors for the said period". (A.P.O. No. 172 of 2018) and had agreed that Sudera consequent on the change of its name would be entitled to "consolidated rent of only Rs.27.35 per sq.ft. per month comprising of Rs.3.33 per sq.ft. per month as basic rent, Rs.4.95 per sq.ft. per month as service charge and Rs.19.07 sq.ft. per month as air-conditioning charge clear of all deductions effective from December 1, 1999." (emphasis supplied)

84) The Learned Arbitrator recorded that despite being called upon to register the leases, the appellant had failed to do so and had instead served on the respondent a notice surrendering the leases. It was recorded that the appellant's case that there is no mention in the lease deed "that fixation of rent was made conditional upon occupancy of the demised premises for a minimum period of ten years" (Page 8 of A.P.O. No. 172 of 2018) was rejected by the Learned Arbitrator upon holding that "the agreement between the parties were in the nature of a package deal." (emphasis supplied)

85) The Learned Arbitrator further held that it was the duty of the Corporation to get the lease deed registered. The Arbitrator further held that even the unregistered lease deed could be looked at for the collateral purpose of maintaining an action for damage for breach of contract relying on the decision of the Hon'ble Supreme Court in ***Food Corporation of India -Vs- Babulal Agarwal*** reported in **(2004) 2 SCC 712**. The Learned Arbitrator held that despite the lease not being registered, the appellant was liable to compensate the respondent. While holding that it was the obligation

of the appellant to register the lease, the Learned Arbitrator held that the respondent had violated the agreement and also could not take advantage its own failure to register the lease deed and was as such, liable to pay damages.

86) While proceeding to assess the damages, the Learned Arbitrator accepted the claimant's entitlement to claim damages in terms of the contract entered into by it with the appellant, but in proceeding to compute such damages, the Learned Arbitrator only proceeded to take into account the basic rent of Rs.3.33 per sq.ft. per month ignoring the entire component of services charge and air-conditioning charges.

87) Mr. Saha submits that the Arbitrator is the final word on the interpretation of the contract. Accordingly, the Arbitrator's finding that the lease agreement was in the nature of a "package deal" which allowed the appellant to continue to occupy the premises at a consolidated rent of Rs.27.35 per sq. ft. per month subject to the appellant continuing in possession for a further period of ten years since the execution of the earlier lease cannot be called into question. Mr. Saha in this regard has relied upon the decision of the Hon'ble Supreme Court in ***Patel Engineering Limited - Vs. North Eastern Electric Power Corporation*** reported in (2020) 7 SCC 167 (para 21). Mr. Saha submits that on the basis of the materials on record it cannot be said that no fair minded or reasonable person could have taken the view taken by the Learned Arbitrator or that such view was not even a possible view to take.

88) That it was the appellant's obligation to register the lease deed is not denied. That the appellant did not do so despite being called upon by the respondent to register the leases also cannot be denied. In the event, the leases had been registered, the appellant would not have been in a position to contend that it was not obliged to continue to occupy the concerned premises for a period of ten years from the expiration of the earlier leases. Having induced the respondent to believe that it would continue to occupy the premises for a further period of ten years at a consolidated rent of Rs.27.35 per sq. ft. per month and having thereby induced the respondent to withdraw the suits filed against the appellant and to absolve the appellant of his undertaking to pay occupation charges for its occupation of the concerned premises @ Rs.60/- per sq. ft. per month, the appellant is now estopped from resiling from the promise clearly made by it before the Hon'ble Supreme Court by bringing on record the lease deed recording the settlement. Mr. Saha submits that estoppels operates against the Corporations in denying payment of reasonable compensation resulted due to such breach and in this regard the learned Senior Counsel has relied upon the decision in **V. L. Sreedhar & others -Vs- K. M. Munireddy (dead) and others** reported in **(2003) 2 SCC 355** (paragraphs 13 to 20) and **Halsbury's Laws of England (3rd Edition)** Vol. 15 page 175.

89) As the appellant had clearly agreed to register the lease, by refusing to register the leases, the appellant cannot be allowed to take advantage of its own wrong, as the appellant has evidently sought to do and refers to the well known doctrine of "*nullus commodum capere potest ex sua*

injuria propria" that no person can take advantage of his own wrong. Mr. Saha has also relied to Broom's Legal Maxim ((10th Edn.) Page 194, the decision of the Hon'ble Supreme Court in ***Kusheshwar Prosad Singh -Vs- State of Bihar & Ors.*** Reported in **(2007) 11 SCC 447** (paras 13 and 14) and ***Samir Narayan Bhojwani v. Aurora Properties and Investment & Anr.*** reported in **(2018)17 SCC 203** (para 29).

90) Mr. Saha has submitted that in any event the Hon'ble Supreme Court in ***Food Corporation of India v. Babulal Agarwal*** reported in **(2004) 2 SCC 712** has clearly stated that where the parties had agreed to occupy a particular property for a particular period of time and had executed a lease for such period, even in the absence of registration of the lease, the party having agreed to occupy the property for a particular duration and has reached an agreement to that effect, will be liable to compensate the other party in case of breach and in the said decision the breach of the promise was enforced *ex contractu*. (paras 6, 7 and 8). Mr. Saha has invited our attention to the observation of the Hon'ble Supreme Court: "once the amount of monthly rent of the plinths was agreed, unless there was some logical or cogent reasons to reduce the same, it could not be done.". (emphasis supplied)

91) Mr. Saha submits that the Hon'ble Supreme Court in Babulal (*supra*) has accepted that the basis of quantification of compensation of loss would be the contractual rate of rent agreed to be paid.

92) The non-registration of the lease does not in any event prevent consideration of the same for the collateral purpose for ascertaining the

damage resulting from the breach of promise in view of the provisions 49 of the Registration Act, 1908 as held in the following decisions:

- a) ***Food Corporation of India -Vs- Babulal Agarwal*** reported in **(2004)2 SCC 712 (Para 7)**.
- b) ***Abhey Realtors Pvt. Ltd. -Vs- SSIPL Retail*** reported in **(2010)2 CHN 203** (paras 22-23).
- c) ***Muruga Mundaliar -Vs- Subba Reddyer*** reported in **AIR 1951 Madras** (Full Bench para 12).

93) The claimant in the two applications have adduced evidence to show that it had indeed made attempts to mitigate its loss which has been appreciated and judged by the learned Arbitrator and the Learned Arbitrator has thereafter come to a conclusion that the claimants indeed took steps and had adduced evidence in that regard. Such finding of the learned Arbitrator after judging the quality and quantity of evidence cannot be questioned today and cannot be held to be invalid in a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996.

94) It is now settled that the Arbitrator's appreciation of evidence is final and cannot be interfered with in a challenge under Section 34 of the Act of 1996 unless it is shown to be perverse. There is clearly no perversity in Arbitrator's finding on the evidence led by the respondent that it had attempted to mitigate the loss by letting out the premises but had failed to do so.

95) Mr. Saha submits that in ***Muddasani Venkata Narsaiah v. Muddasani Sarojana*** reported in **(2016) 12 SCC 288**, the Hon'ble

Supreme Court held that the effect of not cross examining a witness is that the statement of the witness is not disputed and must be accepted. In view thereof the entire case of the claimant on assessment of damages as adduced by the claimant's second witness thus stands admitted.

96) The appellant has not by itself led any evidence to show that there were persons willing to take the demised premises on lease/rent for the residue periods of the leases but the respondent did not agree to lease or let out the said premises and thus, failed to mitigate their loss and damage. In the circumstances, the question of any violation on the part of the respondent to mitigate the loss or damage suffered by it did not and could not arise.

97) It is now settled law that in an attempt to mitigate loss or damage consequent on the breach of a contract, the party suffering on account of such breach is not obliged to attempt mitigation in every possible manner. It is only reasonable steps which are required to be taken to mitigate. Accordingly, the respondent was under no obligation to divide or sub-divide the demised premises into smaller portions or to attempt to let out or lease the same for the residue period of the lease.

98) Mr. Saha submits that Section 73 of the Indian Contract Act, 1872 has been properly interpreted in the award excepting that in determining the damages the other components of rent were discarded.

99) Mr. Saha submits that there cannot be any doubt that the claimants have suffered loss and damage that was already pre-estimated

and pre-determined by way of fixed lease rent that the appellant had agreed to pay for the entire period of lease.

100) As such, the award cannot be questioned on the ground that even upon the rent for the residue period of the lease being exactly quantified in the lease deeds themselves, the respondent did not lead further evidence to establish loss or damage suffered or that even in the absence of any further evidence being led by the claimants, the Arbitrator proceeded to determine loss and damage suffered by the claimants.

Our view:-

101) The essential dispute is with regard to quantification of damage. The arbitrator allowed damages based on basic rent and disallowed air-condition and service charges. The learned Single Judge remanded the matter for fresh adjudication of the damages. Corporation is aggrieved by such order of remand and a fresh reference. We need to decide if the award is assailable within the limited grounds under Section 34 of the 1996 Act prior to amendment in 2015. The approach of the court in interfering with the award is limited and circumscribed by the grounds mentioned in Section 34 of the 1996 Act.

102) There were various changes which were brought about in the 1996 Act from the 1940 Act. The purpose of the new Act was to have speedy disposal through the forum of arbitration.

103) The strive towards achieving the aim, the Act proceeds to give a sense of finality to the awards of the arbitral proceedings. The new Act is based mostly on the UNCITRAL model law. The object of the new Act was

to make the law less technical than it has been hitherto. As compared to the 1940 Act the 1996 Act restricts the court interference with the awards passed by the arbitrator. The major difference between the acts can be mapped through the reading of Sec30 of the 1940 Act and Sec34 of the 1996 Act, which covers the grounds on which an arbitral award could be set off.

<u>Arbitration and Conciliation Act, 1940</u>	<u>Arbitration and Conciliation Act, 1996</u>
Section 30: Grounds for setting aside award	Section 34: Application for setting aside arbitral award
Grounds: (a) "Misconduct" of an arbitrator or umpire (b) "Invalidity" of arbitration proceedings or by an order of court the arbitration is superseded. (c) Award is improperly procured or is "other-wise invalid"	Grounds: (a) If the party proves that: (i) That party was under some incapacity (ii) That arbitration is invalid under the law to which parties have been subjected or under the law being in time force (iii) That the award passed is beyond the scope of the submission or not falling within the terms of the submission to arbitration. (Provided: if decisions on matters not submitted can be separated from those which are submitted then only the award based on the former may be set aside) (iv) Composition of the arbitral tribunal or procedure was not in accordance to the agreement of the parties unless it was in conflict with

	the provisions of the Part from which parties cannot derogate or failing such agreement, was not in accordance with this Part. (b) If the Court finds out: (i) The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or (ii) The award is in conflict with the public policy of India. Explanation: An award is in conflict of the public policy of the India if the award was induced or affected by fraud or corruption or was in violation of S.75 or S.81.
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104) The aforesaid Table lays down the grounds which were given in the respective Act with respect to setting aside of arbitral awards. It is important to understand how the grounds for setting aside an award under the 1996 Act are more restricted than the grounds given in the 1940 Act.

105) The 1940 Act, has grounds like “misconduct of arbitrator”, “invalidity of arbitral proceedings” and “award other-wise invalid” were wide, sweeping and open ended which used to give an extensive power to the courts to set aside an award. These expressions were usually interpreted widely by the courts and the awards were most often set aside – especially on the basis of “misconduct” inter alia apparent error of law in the award. Thus, the aim of arbitration which is to reduce the burden of the courts was not being achieved. Rather, due to the number of opportunities in the hand

of the litigants to ask the court for intervention regarding the award --the burden was increasing on the courts.

106) To make the arbitration proceedings effective and binding on the parties who choose for arbitral proceedings, it was imperative to structure a new Act to fill in the loopholes of the 1940 Act. The 1996 Act was thus brought into the picture which tried to fill in the gaps of the previous law of arbitration in the country. The need of an arbitral system favoring nation was to reduce the workload of the courts and give certainty and finality to the arbitration proceedings and the awards thereon. Thus, the 1996 Act under S.34 lays down restrictive grounds of interference of the courts with the arbitral awards.

107) Section 34 introduces itself by saying that the grounds mentioned thereunder are the “only” grounds on which an arbitral award may be set aside. However, apart from the grounds mentioned under S.34, the Act also provides for other grounds as under S.13, S.16, S.75 and S.81 on the basis of which the award can be set aside.

108) The grounds given under S.34(2)(a) are crisp and precise and lay the law as it is without the inclusion of any open-ended expression which otherwise would have given the courts an opportunity to widen their scope of interference with the arbitral awards. The only open-ended expression which can be and has been of concern is the ground of public policy of India. It has been under many cases defined as an unruly horse thus giving the interpretation that it can never be defined or be a certain thing. However, for the purpose of achieving the aim of the new Act, the Act

of 1996 – the legislature while drafting the Act limited the scope of public policy in its explanation restricted it to:-

- a) Fraud
- b) Corruption
- c) S.75 or S.81 (confidentiality breach or admissibility of evidence)

109) The scope of public policy was, however, widened after Supreme Court in its decision of Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003 (5) SCC 705) (also referred to as : “Saw Pipes Case”) interpreted it to include “patent illegality” in its definition.

110) Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. It is a settled law that interpretation of the contract and appreciation of the evidence by the arbitral tribunal cannot be reopened by arguing that the award is contrary to the contract. Arbitration is consensual and some amount of laxity should be given while scrutinizing an award. A sense of informality is attached to such proceeding. It cannot be scrutinized with an Eagle’s eye or eye of a needle and as an appellate authority. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

111) Once it is found that the arbitrator’s approach is not arbitrary or capricious it has to be accepted. He is the last word on facts. The

construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person would do, of course, the arbitrator cannot wander outside the contract and deals with the matters not forming the subject matter or allotted to him as in that case he would commit jurisdictional error.

112) In ***Delhi Development Authority v. R.S. Sharma, 2008(13) SCC 80*** the Hon'ble Supreme Court summarized the law thus:

“From the above decisions, the following principles emerge:

(a) An Award, which is

- (i) Contrary to substantive provisions of law; or
- (ii) The provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) Against the terms of the respective contract; or
- (iv) Patently illegal, or
- (v) Prejudicial to the rights of the parties, is open to interference by the Court under S.34(2) of the Act.

(b) Award could be set aside if it is contrary to:

- (i) Fundamental policy of Indian Law; or
- (ii) The interest of India; or
- (iii) Justice or morality;
- (iv) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court;

(v) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”

113) The Supreme Court in **Mc Dermott International v. Burn Standard Co. Ltd.; 2006 (11) SCC 181**, has commented on the scope of the powers of the arbitrator to interpret terms of the contract, and the permissible interference by the courts on the assessment of the arbitrator. It was held:-

“ It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. The 1996 Act makes the provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrator, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court’s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

114) The Court will not judge the reasonableness of a particular interpretation accorded by the arbitrator to the terms of the contract. Even

an error in interpretation, unless patently illegal, will only amount to an error within the jurisdiction of the arbitrator.

115) In ***KV Mohd. Zakir v. Regional Sports Centre*** reported at **AIR 2009 SC (Supp) 2517** it held that the courts should not interfere unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his/her jurisdiction.

116) In ***P.R. Shah Shares & Stock Brothers v. M/s. B.H.H. Securities (P) Ltd.; 2012 (1) SCC 594*** it states that a court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-approaching the evidence. An award can be challenged only on the grounds mentioned in S.34(2) of the Act.

117) In ***Steel Authority of India Ltd. v. Salzgitte Mannesmann; OMP No.736 of 2009***, decided on 18th April, 2012 (Delhi HC) it refused to set aside the award in view of court's limited and restricted powers for judicial intervention as under S.34 of the Act. The court relied upon the judgment in *P.R. Shah Shres* (supra) and held that the court cannot sit in appeal over the award of the tribunal by re-assessing and re-evaluating the evidence.

118) Mr. Saha has argued that the rent mentioned in the two several lease deeds are required to be taken as a whole without any bifurcation for the purpose of determination of damages as the said amount represents a genuine pre-estimate as the measure of reasonable compensation which would be clearly discernible from the course of conduct of the parties resulting in the execution of the lease deed.

119) The existence of the lease deed is not in dispute.

120) The Corporation has never raised any dispute with regard to the existence, validity and the terms of the lease deed. In fact, the lease deed was also acted upon before it was unilaterally terminated by the Corporation although the Corporation before the execution of the lease deed objected to the inclusion of any termination clause as proposed by the claimants in the draft lease deed thereby clearly evincing its intention and willingness to continue for the periods fixed in the lease deeds. The bifurcation of the rent to basic rent and air-conditioning charges and service charges and thereby allowing compensation for the basic rent is what is objected to by the claimants.

121) Mr. Saha has drawn our attention to Clause 7 of the lease agreements to show that in case of any default in payment of the air-conditioning charges for any two months by the lessee discontinue and/or disconnect and/or withdraw the air-conditioning facilities from the said floor without being liable for damages for such discontinuance and/or disconnection and/or withdrawal. And the lessor would not be bound to restore or resume continue the air-conditioning facilities unless full payment of the arrear of such charges is made by the lessee together with reconnection charges and it would be in the sole and absolute discretion of the lessor.

122) Mr. Saha submits that once the learned Arbitrator has accepted that it was a “package deal” meaning thereby that the Corporation could not have an exit prior to the fixed period mentioned in the two several lease

deeds for the purpose of determination of damages, component towards air-conditioning charges is also required to be taken into consideration. Merely because the Corporation left the premises notwithstanding their obligation to continue for the fixed period for the purpose of determination of damage would not absolve them from paying the rents stipulated in the agreements as it represents a genuine pre-estimate. This amount is also a backdrop to be taken into consideration.

123) However, we are unable to accept the submission of Mr. Saha in this regard.

124) The arbitrator has given a view on interpretation of the two agreements with regard to entitlement of air-conditioning charges which does not appear to be unreasonable, improbable or irrational. Any interference of such finding of the learned Arbitrator would fall foul with the well established principle that the interpretation of the contract is within the exclusive domain by the learned Arbitrator. The arbitrator has allowed the claim towards damages based on the basic rents mentioned in the two deeds. The arbitrator denied air-conditioning charges as it was discontinued due to sudden exit of the corporation.

125) The decision of the learned Arbitrator is a possible view and an acceptable outcome which is clearly defensible in respect of the facts and law.

126) Even in a civil trial, a finding of fact is not to be reversed unless it can be established that the trial Judge made a palpable and overriding error which means an error that gives rise to the reasonable belief that the

trial judge must have forgotten, ignored or misconceived the evidence in a way that it affected his conclusion or an obvious deficiency in the trial Judge's finding of fact that affects the outcome of the trial. The Court in this jurisdiction, however, is not exercising such sweeping power. It is settled law that where a finding is based on no evidence or an arbitral tribunal takes into account something irrelevant to the decision which it arrives at or excludes as ignores vital evidence in arriving at its decision, such decision would necessarily be perverse and on those grounds, an award can be set aside.

127) In the instant case the award is based on evidence. The reason may be brief.

128) In ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*** reported at **(2003) 5 SCC 705** the Hon'ble Supreme Court followed ***Maula Bux v. Union of India*** reported at **1970 SCR (1) 928** and summarized the law in paragraph 68 which reads:

"68. From the aforesaid discussions, it can be held that: (1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.” (emphasis supplied)

129) It is equally well-settled that the damage is a compensation for the injury sustained that the sum of money to be given for reparation of damages suffered should be, as nearly as possible be the sum which will put to injured party in the same position as he would have been if he had not sustained the wrong for which he is getting the damages. **(B.R. Herman & Mohatta v. Asiatic Steam Navigation Co. Ltd., AIR 1941 Sind 146).**

130) The award on the damages cannot be said to be without evidence. The learned arbitrator has considered the agreements between the parties and the affidavit evidence filed by Mr. Sethia to show that the periods for which damages have been claimed the claimants in spite of due diligence could not find a suitable lessee. Mr. Sethia had said that considering the largeness of the area under occupation of the Corporation the claimants could not find out any lessee with similar requirements. The example of peerless was given by Mr. Sethia in his evidence. It cannot be said to be an award based on no evidence. Moreover, the amounts

mentioned can be considered to be genuine pre-estimate agreed by the parties as the measure of reasonable compensation having regard to the correspondence exchanged and the circumstances culminating to the executing of two deeds. However, in assessing damages two components were not allowed as corporation left the premises prematurely.

131) In ***Associate Builders*** (supra) the Supreme Court held that it must be clearly understood that when a Court is applying 'public policy' test to an arbitral award, it does not act as a Court of appeal and consequently the errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to be accepted as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon, when he delivers his arbitral award. Thus, an award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators' approach is not arbitrary or capricious then he is the last word on facts.

132) Reasonableness of the decision cannot be a matter of judicial review in deciding an application for setting aside and award.

133) Once the arbitrator has come to a finding the Court should not interfere with the award unless reasons given are outrageous in their defiance of logic or if the arbitrator has acted beyond his jurisdiction. Moreover, the Court does not sit in appeal over the award of the arbitral tribunal by re-assessing, re-approaching or re-appreciating the evidence. It is well settled that the Court does not sit in appeal over an award. It is not

for this Court to reassess the evidence on record. It is also not for this Court to weigh the quality and quantity of the evidence put forward before the Arbitration. In ***Ravindra Kumar Gupta & Co. v. Union of India*** reported at **2010 (1) SCC 409** it is reiterated that reappraisal of evidence by the Court is not permissible. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a Judge on the evidence before the arbitrator. The award can be challenged only on the ground mentioned in Section 34(2) of the Act.

134) Mr. Saha has argued that amendment to the 1996 Act in 2015 has clarified when can an award be held to be in conflict with the “public policy of India” and significantly in clause 2(A) in the proviso it has been clearly stated that an award shall not be set aside merely on the ground of an erroneous application of the law or by the reappraisal of evidence.

135) We accept the said submission. An erroneous application of the law by itself is not a ground to challenge an award under Section 34 of the Arbitration and Conciliation Act. For an award to be set aside there must be a patent illegality, an error which goes to the very root of the matter and affects the jurisdiction of the arbitrator in deciding a dispute. If the arbitrator lacks the authority to decide the dispute the award is a nullity. If

the disputes are by nature non-arbitrable the assumption of jurisdiction would be an illegality.

136) The judgment in **Associate Builders** (*supra*), which was passed in relation to a domestic award also recognized and reaffirmed the settled law that where a cause or matters in differences are referred to an arbitrator, whether lawyer or layman, he is considered to be the sole and final judge of all questions of law and of fact obviously with the limited grounds of interference, namely, if it is opposed to fundamental policy of Indian Law, interest of India, justice or morality and patent illegality.

137) A patent illegality would mean an illegality which goes to the root of the matter and not a mere erroneous application of the law is the view in **Associated Builders** (*supra*) which was reiterated in **SSangyong Engineering & Construction Company Ltd. v. National Highway Authority of India**, reported in **2019(15) SCC 131** in paragraphs 37, 39, 40 and 41 of the said report which reads:

“37. Insofar as domestic awards made in India are concerned, an additional ground is now available Under Sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. To elucidate, paragraph 42.1 of *Associate Builders (supra)*, namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of *Associate Builders (supra)*, however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in *Associate Builders (supra)*, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added Under Section 34(2A).

41. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of *Associate Builders (supra)*, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

138) The arbitrator's view on the 'package deal' is backed up by years of training and experience as a judge and, in effect, is a rational view on the interpretation of the termination clause in the backdrop of the conduct of the parties. The conduct of the Corporation in inducing the claimants to withdraw all proceedings which saved them from huge financial liabilities following the decree of eviction and thereafter suddenly terminate the lease after having agreed to continue for a fixed period of time is a relevant factor. In fact, it is clear from evidence that the Corporation raised objection to the termination clause suggested by the claimants in the draft lease. They have even agreed to execute the lease. It happens that such representations were made by the Corporation without any intention to discharge their obligations finally. It is a commercial immorality on the part of the corporation.

139) The arbitrator based on such oral and documentary evidence and having considered the conduct of the parties was persuaded to hold the agreements as "package deal". The conduct of the parties prior to the execution of the lease deeds was also considered.

140) The correspondence exchanged by and between the parties prior to the preparations of lease deed clearly suggest that the Corporation wanted to continue the relationship for a fixed period without any break. The view taken by the arbitrator is a possible and plausible view.

141) Any other interpretation on the facts would be inequitable. In any event such interpretation of the contract is exclusively within the domain of the arbitrator.

142) Under such circumstances, the awards are upheld.

143) The appeals and the cross objections stand dismissed.

144) However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Saugata Bhattacharyya, J.)